Petition

81-1812

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FOUNDING CHURCH OF SCIENTOLOGY
OF WASHINGTON, D.C., INC.,
Petitioner,

v.

DONALD T. REGAN,
SECRETARY OF THE TREASURY, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an agency subject to the Freedom of Information Act can be compelled to retrieve for processing under the Act agency records which it once had, but no longer maintains, in its possession, where it is demonstrated that the agency has control over the records and can readily obtain them upon request.

2. Whether a district court has authority under the Freedom of Information Act to order an agency subject to the Act to retrieve from a third party agency records no longer in the agency's possession, but subject to its control.

PARTIES TO THE PROCEEDINGS

Plaintiff-Appellee: Founding Church of Scientology of Washington, D.C., Inc.

Defendants-Appellants: Donald T. Regan, Secretary of the Treasury; Department of the Treasury; James B. Clawson, Deputy Assistant Secretary of the Treasury for Enforcement and Operations; National Central Bureau of the International Criminal Police Organization; and Louis B. Sims, Chief, National Central Bureau of the International Criminal Police Organization.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Founding Church of Scientology of Washington, D.C., Inc., respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on December 31, 1981, by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing orders entered by the lower court and rendered December 31, 1981, appears at 1a of the Appendix to this Petition. A Memorandum and Order entered by the United States District Court for the District of Co-

lumbia on April 17, 1980, which was reversed on appeal, appears at 19a of the Appendix; and, a Memorandum and Order entered by the district court on May 13, 1980, denying defendants' motion for reconsideration of the April 17 order, appears at 30a of the Appendix. These two orders also appear at *Founding Church of Scientology* v. *Miller*, 490 F. Supp. 144 (D.D.C. 1980). An Order entered by the district court on November 3, 1978, appears at 17a of the Appendix and an earlier order entered by the district court on August 11, 1977, appears at 14a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 31, 1981. This Petition is filed within 90 days of that judgment. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Freedom of Information Act, as amended, 5 U.S.C. § 552 (1976) provides in pertinent part:

> (a) Each agency shall make available to the public information as follows: . . .
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules . . . and procedures to be followed, shall make the records promptly available to any person. . . .
>
> (4) . . . (B) On complaint, the district court of the United States in which the complainant resides, or has his principal place of business, . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter

de novo, . . . and the burden is on the agency to sustain its actions. . . .

(6) . . . (B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended. . . . As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; . . . .

STATEMENT OF THE CASE

In September 1975 petitioner, a nonprofit corporation chartered and operating under the laws of the District of Columbia, brought suit under the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552 (1976), against the Department of Treasury and a component thereof, the United States National Central Bureau of the International Criminal Police Organization (hereinafter "Interpol"), and certain government employees acting in their official capacities, including the Secretary of Treasury. Jurisdiction was based on 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

In its complaint petitioner alleged that the United States National Central Bureau (hereinafter "USNCB") is the American liaison with Interpol and an "agency" within the meaning of 5 U.S.C. § 552(a) and (e), and that it had improperly withheld records requested by petitioner under the FOIA relating to, *inter alia*, petitioner, Scientology generally, and its founder, L. Ron Hubbard. Essentially USNCB serves as a message and information exchange between the United States and its domestic police authorities and Interpol, "which, in turn, is the conduit of communication among the national central

bureaus of different nations" participating in Interpol.[1] App. 3a.

The focus of petitioner's action in district court was twofold: one, that during the administrative processing of petitioner's FOIA request USNCB had improperly invoked certain statutory exemptions to withhold from disclosure in whole or in part documents at USNCB; and two, that additional documents responsive to petitioner's FOIA request had been forwarded to Interpol headquarters in Paris by USNCB and that no copies had been retained. App. 4a. In district court, petitioner moved for a *Vaughn* index of the documents at Interpol, *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), and also sought to depose the Secretary General of Interpol to determine what documents responsive to its FOIA request were located at Interpol's headquarters. The district court denied petitioner's discovery request, but held that

> [c]ertain documents presently possessed by Interpol were originally created and maintained by [US]NCB. These, then, clearly qualified at one time as "agency records" within the meaning of the Act. Without retaining copies of these documents, [US]NCB forwarded them to Interpol, which maintains custody of them subject to demand by [US]NCB for their production.

Order, August 11, 1977, at 2, App. 15a. Accordingly, the district court ordered respondents to provide "a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, of those records maintained at Interpol that were compiled, received, or maintained by [US]NCB." App. 16a.

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[1] Descriptions of Interpol and its operations may be found at 2-3 of the Appendix; in *Sami* v. *United States*, 617 F.2d 755, 758-59 (D.C. Cir. 1979); and in *Steinberg* v. *Interpol*, No. 80-1336, (D.C. Cir., decided Oct. 23, 1981), *rehearing denied* (D.C. Cir., decided Feb. 16, 1982). As one Court has observed, "Interpol appears to occupy a rather ambiguous and shadowy existence in this country." *Steinberg* v. *Interpol*, No. 80-1336, slip op. at 3 (D.C. Cir., decided Oct. 23, 1981).

Because respondents failed to comply with that order, the district court on November 3, 1978, entered another order requiring respondents to provide the *Vaughn* index of the relevant documents maintained at Interpol within 20 days. App. 17a. Respondents partially complied with the orders by requesting Interpol headquarters for certain of the documents and providing a *Vaughn* index of 36 documents obtained from Interpol as a result. Because respondents had not complied fully with the district court's orders, petitioner moved to compel respondents to comply properly with the orders. On April 17, 1980, the district court held that respondents had engaged "in dilatory tactics" and that they were in violation of the orders of August 11, 1977, and November 3, 1978, and ordered respondents "yet again to comply with [the] original August 11, 1977, order." *Founding Church of Scientology* v. *Miller*, 490 F. Supp. at 150, App. 28a.

Although this Court had entered its opinion in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), on March 3, 1980, over a month before the district court's order of April 17, respondents did not advise the district court of the decision until early May 1980, after they had determined that Interpol had additional documents which it was prepared to transmit to USNCB for processing under the FOIA. At that time respondents moved the district court to reconsider, in light of the *Kissinger* decision, its order of April 17 requiring respondents to produce a *Vaughn* index of the additional responsive documents at Interpol headquarters.

The district court held that *Kissinger* was not controlling and reaffirmed its original ruling. *Founding Church of Scientology* v. *Miller*, 490 F. Supp. at 151, App. 31a-32a. The district court determined (1) that in this case unlike in *Kissinger* there was no indication that USNCB would have to file a lawsuit to retrieve from Interpol documents responsive to the FOIA request and, indeed, respondents had previously obtained such

documents simply upon request; (2) that the FOIA imposes an obligation on agencies "to search for and collect the requested records from field facilities and other establishments that are separate from the office processing the request," 5 U.S.C. § 552(a)(6)(B); and, (3) that to permit USNCB to escape compliance "could result in virtually exempting the [US]NCB from the operation of the Act"—a result, the district court held, which "Congress could not have intended." 490 F. Supp. at 151, App. 32a.

Respondents appealed from the order of April 17 and the order denying their motion for reconsideration and the Court of Appeals reversed.[2] Relying on *Kissinger* the Court held that the FOIA "does not confer authority upon the courts to command agencies to acquire a possession or control of records they do not already have." App. 11a. The Court also disagreed that 5 U.S.C. § 552(a)(6)(B) was a sufficient predicate for requiring USNCB to retrieve and index the documents once in the possession of USNCB but since forwarded to Interpol. App. 12a. Accordingly, the Court reversed "the District Court's order requiring USNCB to retrieve and index the documents already forwarded to Interpol." App. 12a-13a.

Petitioner seeks a writ of certiorari to review a question fundamental to the effective enforcement of the FOIA; namely, whether a district court has authority under the FOIA to command an agency to retrieve agency records that once were, but no longer are, in its physical possession, but are subject to its control.

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[2] The decision of the Court of Appeals also dealt with other rulings by the district court. Petitioner prays, however, that a writ of certiorari issue to review only that part of the judgment of the Court of Appeals that reversed the district court's ruling that respondents retrieve from Interpol headquarters and process the additional documents responsive to petitioner's FOIA request.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Appeals Is In Conflict With An Applicable Decision Of This Court And Involves An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The legislative history of the FOIA, as well as decisions of this Court, emphasize the importance of enhancing public knowledge of the way government agencies operate and permitting public scrutiny of their conduct. The commanding objective of the FOIA is "disclosure, not secrecy," and to that end agency records are to be available for public inspection, subject only to nine carefully delineated statutory exemptions that are to be narrowly construed. *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976).

The decision of the Court of Appeals that district courts are without authority "to command agencies to acquire a possession or control of records they do not already have," App. 11a, is in conflict with this Court's decision in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), and frustrates effective enforcement of the FOIA and congressional intent. Contrary to the decision of the Court of Appeals, *Kissinger* does not compel the conclusion that actual physical possession by an agency of records sought under the FOIA is a threshold predicate to federal jurisdiction under the Act.

Kissinger makes clear that under the FOIA, "federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" 445 U.S. at 150. As in *Kissinger* the critical question here is whether a covered agency has "withheld" documents requested under the FOIA.[3] Neither

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[3] The district court concluded here that requested records at one time in the possession of and maintained by USNCB were "agency records" within the meaning of the FOIA. App. 15a. *See Forsham* v. *Harris*, 445 U.S. 169, 182 (1980) (holding "that an agency must first either create or obtain a record as a prerequisite to it becom-

the Act nor its legislative history "purport to define the word." 445 U.S. at 151. *Kissinger* held, however, that the word "withhold" necessarily "presupposes the [agency's] possession *or control* of the item withheld," and, therefore, that "possession *or control* is a prerequisite to FOIA disclosure duties." 445 U.S. at 151 (emphasis added). Because the documents sought were no longer in the possession of the agency subject to the FOIA request in *Kissinger* and under the facts they could only be retrieved through litigation commenced by the agency, this Court concluded that "[a] refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb 'withhold.'" 445 U.S. at 151.

Here the circumstances are decisively different. In partial compliance with the district court's orders, USNCB initially requested from Interpol and readily obtained, without objection, records called for by petitioner's FOIA request. Indeed, in a letter dated December 14, 1978, from Interpol's Secretary General in France to USNCB in response to USNCB's initial attempt at compliance with the district court's orders, the Secretary General forwarded a list of responsive documents and candidly advised that "[s]hould any other documents come to light subsequently you will, of course, be informed."[4] Later, subsequent to the April 17, 1980, order of the district court, USNCB requested Interpol to identify any additional documents and Interpol did so, again without objection. The circumstances plainly demonstrate that USNCB had "control," if not actual "possession," over documents that once were agency records.

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ing an 'agency record' within the meaning of the FOIA"). Respondents did not appeal from this ruling by the district court, nor did the Court of Appeals address the propriety of this ruling in its decision. Whether an agency has "improperly" withheld agency records, the third jurisdictional prerequisite, focuses on the applicability of any of the statutory exemptions to disclosure, an issue that is premature at this juncture.

[4] Brief for Appellee at 34, filed by petitioners in Court of Appeals, Jan. 22, 1981.

Because *Kissinger* establishes that "possession or control is a prerequisite to FOIA disclosure duties," 445 U.S. at 152, the decision of the Court of Appeals conflicts with *Kissinger* and the writ prayed for should issue to resolve this conflict.

Moreover, the fact that physical possession of documents, in and of itself, is not determinative of the district court's jurisdiction under the FOIA is evidenced by numerous decisions employing a standard of control rather than possession in determining whether a document requested under the FOIA is an "agency record" within the meaning of the Act. *See, e.g., Holy Spirit Ass'n* v. *CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980); *Carson* v. *Department of Justice*, 631 F.2d 1008, 1010 (D.C. Cir. 1980); *Ryan* v. *Department of Justice*, 617 F.2d 781, 785 (D.C. Cir. 1980); *Goland* v. *CIA*, 607 F.2d 339, 344-48 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *RCA Global Communications, Inc.* v. *FCC*, 524 F. Supp. 579, 582-84 (D. Del. 1981); *Dunaway* v. *Webster*, 519 F. Supp. 1059, 1073-75 (N.D. Cal. 1981); *Agee* v. *CIA*, 517 F. Supp. 1335, 1341 (D.D.C. 1981). Whether a "control" test ought also be the standard for determining whether agency records have been "withheld" is an important question of federal law not definitively resolved in *Kissinger* and should be resolved by this Court to ensure effective enforcement of the FOIA. Otherwise an avenue exists for circumventing the FOIA and an incentive will be created to insulate records from FOIA requests and frustrate the salutary purposes of the Act.[5]

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[5] For example, a covered agency simply could transfer its records to a body not an "agency" within the meaning of the FOIA, refuse to make any efforts to retrieve the "agency records" requested, and thereby render the FOIA, as Justice Brennan put it, "a dead letter." 445 U.S. at 159. Here USNCB has transferred agency records to Interpol headquarters and now refuses to retrieve and index the relevant documents—action endorsed by the Court of Appeals, but a result that Congress surely did not intend.

2. Whether District Courts Have Authority Under The FOIA To Order Agencies To Retrieve From A Third Party Agency Records No Longer In Their Possession, But Subject To Their Control, Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Notwithstanding the factual record, demonstrating USNCB's control over agency records now maintained at Interpol headquarters, the Court of Appeals concluded that the district court had no authority to order the agency to request Interpol, "a third party in the eyes of *Kissinger*," App. 13a, to supply the relevant agency records transferred to it. But as this Court has recognized, district courts have broad discretion pursuant to inherent equitable powers vested in them by the FOIA to enforce the rights established by the statute. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. at 154 ("Congress intended federal district courts to retain traditional equitable jurisdiction in adjudicating FOIA actions"); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974) ("there is little to suggest . . . that Congress sought to limit the inherent powers of an equity court").

Unless the "FOIA is to be more than a dead letter," *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. at 159 (Brennan, J., concurring in part, and dissenting in part), district courts must be assured the authority to order agencies to retrieve agency records no longer in their possession, yet subject to their control. The majority opinion in *Kissinger* did not address the question of whether district courts have such authority; it simply held that because the covered agency in that case had neither possession of nor control over the requested records, the district court was without authority to compel the agency to commence a lawsuit to retrieve the documents.

In this case the district court concluded that 5 U.S.C. § 552(a)(6)(A), which specifies that an agency may have

additional time to comply with a request "to search for and collect the requested records from field facilities and *other establishments* that are separate from the office processing the request" (emphasis added), is sufficient statutory authority to require USNCB to request the relevant documents from Interpol. App. 31a-32a. The Court of Appeals disagreed. App. 12a.

Whether the FOIA, and Section 552(a)(6)(A) thereof, confer upon district courts the requisite authority to compel an agency to retrieve, or at a minimum to demonstrate its inability to do so, agency records transferred by the agency to a third party is an important question of federal law essential to effective enforcement of the FOIA that has not been, but should be, resolved by this Court, and affords an independent basis for granting the writ.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1546

FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC.

v.

DONALD T. REGAN, Secretary of the Treasury, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 75-1471)

Argued January 28, 1981

Decided December 31, 1981

Marleigh Dover, Attorney, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General at the time the brief was filed, *Charles F. C. Ruff*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellants.

Robert A. Seefried, with whom *Earl C. Dudley, Jr.*, was on the brief, for appellee.

Before ROBINSON, *Chief Judge*, MCGOWAN, *Senior Circuit Judge*, and PARKER, *District Judge* *.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292 (a) (1976).

Opinion for the court filed by *Chief Judge* ROBINSON.

ROBINSON, *Chief Judge*: The Government appeals from an order of the District Court requiring the United States National Central Bureau (USNCB) of the International Police Organization (Interpol) to disclose documentary materials, previously received from foreign police agencies through Interpol, concerning the Founding Church of Scientology of Washington, D.C., Inc. In reaching this determination, the court rejected the Government's [1] argument that Interpol is a confidential source within the meaning of Exemption 7(D) of the Freedom of Information Act (FOIA).[2] The court further directed the Government to retrieve and index similar documents, formerly but not currently in the possession of USNCB, from Interpol's files at its headquarters in Paris, France. Recent decision of the Supreme Court and this court, by our analysis, control the questions here at issue, and require us to reverse the order under review.

I. BACKGROUND

Throughout this controversy, the focus has been on documents pertaining to the Church that are or were held by USNCB, the agency maintaining liaison between Interpol and the United States. Interpol [3] is an international body organized "to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the law existing in the different countries and in the spirit of the 'Universal

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[1] We refer to the appellants collectively as "the Government."

[2] 5 U.S.C. § 552(b)(7)(D) (1976), quoted in text *infra* at note 15.

[3] Our description of Interpol and USNCB is taken primarily from one of the affidavits submitted to the District Court. Third affidavit of Marydale Drury (filed May 8, 1980), J. App. 146 [hereinafter cited as Drury Affidavit]. Another description of Interpol and its operations may be found in *Sami* v. *United States*, 199 U.S.App.D.C. 173, 617 F.2d 755 (1979). See also *Steinberg* v. *Interpol*, No. 80-1336 (D.C. Cir. Oct. 23, 1981).

Declaration of Human Rights.'"[4] The organization has its secretariat in Paris, France, where experts in various branches of law enforcement work to assist member countries in coordinating international efforts in that field by compiling and exchanging information on criminal activity.

Interpol has established a world wide communications network, but all actual investigative and enforcement functions are performed by domestic police authorities of participating governments. Each member country designates a national law enforcement agency—the United States has appointed USNCB—referred to as its "national central bureau," to serve as a message and information exchange between that country and Interpol. Official inquiries emanating from law enforcement entities within a member country are channeled through its national central bureau to Interpol, and the route is reversed for responses. The national central bureaus thus serve as transmitters between domestic law enforcers and Interpol, which, in turn, is the conduit of communication among the national central bureaus of different nations.

In 1975, the Church presented a FOIA request for access to all USNCB records relating to the Church and its founder, L. Ronald Hubbard.[5] Reacting thereto, USNCB released numerous documents, in whole or in part, but declined to disclose thirty-seven documents invoking Exemptions 2[6] and 7(C)[7] of FOIA as to some of the documents and claiming that all were shielded by Ex-

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[4] Interpol Const. art. 2 (1968), quoted in *Sami v. United States*, *supra note* 5, 199 U.S.App.D.C. at 176-177, 617 F.2d at 758-759 (1979).

[5] The request was subsequently narrowed to records falling under several specific headings. See Complaint, Exhibit C, J. App. 21.

[6] U.S.C. § 552(b)(2) (1976).

[7] U.S.C. § 552(b)(7)(C) (1976).

emption 7(D).[8] In addition, USNCB informed the Church that several of the documents desired had been forwarded to Interpol in Paris, and that no copies had been retained.

Dissatisfied with this disposition, the Church filed suit in the District Court in an effort to obtain all of the materials it had asked for. The court conducted an *in camera* inspection of the documents still in USNCB's possession and sustained the Government's Exemption 2 and Exemption 7(C) claims as to some,[9] but rejected its Exemption 7(D) argument that all of the documents could justifiably be withheld because they consisted of confidential information furnished only by a confidential source—that is, Interpol.[10] The court rested its holding on two independent grounds, ruling that only persons, not institutions, can be confidential sources within the meaning of Exemption 7(D),[11] and that the Government had failed to demonstrate that the documents were compiled in the course of actual law enforcement activity.[12] Consequently, the court ordered USNCB to release the information sought by the Church and not protected by Exemptions 2 and 7(C).[13]

Addressing the Church's contention that it was also entitled, by an earlier decision of the District Court,[14] to the documents forwarded by USNCB to Interpol, the court

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[8] U.S.C. § 552(b)(7)(D) (1976), quoted in text *infra* at note 20.

[9] *Founding Church of Scientology* v. *Miller*, 490 F.Supp. 144, 146-147 (D.D.C. 1980). Cross-motions for summary judgment provided the procedural posture of the case.

[10] *Id.* at 147-150.

[11] *Id.* at 149.

[12] *Id.*

[13] *Id.* at 150.

[14] *Founding Church of Scientology* v. *Blumenthal*, No. 75-1471 (D.D.C. Aug. 11, 1977), *clarified sub nom. Founding Church of Scientology* v. *Simon*, No. 75-1471 (D.D.C. Nov. 3, 1978).

ordered USNCB to obtain and submit a *Vaughn* index [15] of the materials previously returned to Interpol.[16] On the Government's motion for reconsideration, the court reexamined its document-retrieval order in light of the Supreme Court's intervening decision in *Kissinger* v. *Reporters Committee for Freedom of the Press*.[17] Adopting the view that USNCB is essentially a field facility of Interpol, the court reasoned that "Congress expected agencies to search for their documents in affiliate offices," [18] concluded that *Kissinger* was not controlling in the circumstances presented, and reaffirmed its original ruling.[19]

II. Exemption 7(D)

A. *The Meaning of "Confidential Source"*

Exemption 7(D) of FOIA insulates from mandatory disclosure

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence in-

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[15] See *Vaughn* v. *Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed 2d 873 (1974).

[16] 490 F.Supp. at 150.

[17] 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980).

[18] *Founding Church of Scientology* v. *Miller*, 490 F.Supp. 150, 151 (D.D.C. May 13, 1980) (memorandum and order on reconsideration) [hereinafter cited as "Decision on Reconsideration"].

[19] *Id.* The court subsequently granted the Government's motion for a stay of the disclosure order pending appeal. *Founding Church of Scientology* v. *Miller*, Civ. No. 75-1471 (D.D.C. May 28, 1980) (stay order), J. App. 526.

vestigation, confidential information furnished only by the confidential source. . . .[20]

In part, the District Court based its ruling that Exemption 7(D) was inapplicable on its view that the term "confidential source" was meant to apply only to individuals and not to institutions.[21] In the interval since the court made this interpretation, however, we have decided two cases taking the diametrically opposite stance.

In *Lesar* v. *United States Department of Justice*,[22] we were confronted with the question whether the Department was justified in refusing to disclose an appendix to a special task force report on the assassination of Dr. Martin Luther King, Jr. The contents of the appendix included investigative files compiled by the Memphis, Tennessee, and Atlanta, Georgia, police departments and surrendered to the Federal Bureau of Investigation in return for a promise of confidentiality. We held that the materials constituted confidential information furnished only by a confidential source, and thus that they could lawfully be withheld.[23] In so determining, we rebuffed Lesar's argument that Exemption 7(D) safeguards only information provided by human sources. Our study of the legislative history of this exemption revealed that "Congress did not intend to distinguish among the types of sources, afforded protection under Exemption 7(D)."[24] We therefore held "that the word 'source' in Exemption 7(D) includes not only individuals such as private citizens and paid informants but also entities such as the state and local law enforcement agencies [there] involved."[25] We

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[20] 5 U.S.C. § 552(b)(7)(D) (1976).

[21] *Founding Church of Scientology* v. *Miller*, *supra* note 9, 490 F.Supp. at 147-149.

[22] 204 U.S.App.D.C. 200, 636 F.2d 472 (1980).

[23] *Id. at* 220, 636 F.2d at 492.

[24] *Id.* at 219, 636 F.2d at 491.

[25] *Id.*

reaffirmed this position in *Baez* v. *United States Department of Justice*,[26] where we held that "the word source includes nonfederal entities such as state, local, and foreign law enforcement agencies." [27]

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[26] —— U.S.App.D.C. ——, 647 F.2d 1328 (1980).

[27] *Id.* at ——, 647 F.2d at 1340. The appellant had requested the FBI to produce all information referring to her in files maintained under her name or under the names of other individuals or organizations. *Id.* at ——, 647 F.2d at 1330. Invoking Exemption 7(D), the Government wanted to withhold the identities of state, local, and foreign agencies that had provided information to the agency in confidence. Reiterating the substance of our holding in *Lesar*, we upheld the FBI's refusal to release the data sought, commenting that "Exemption 7(D) protects not only information furnished by a confidential source but the identity of the confidential source as well." *Id.* at ——, 647 F.2d at 1340.

We realize that *Baez* and *Lesar* are distinguishable on their facts. The names of the confidential institutional sources in *Baez* were unknown, but the identities of the suppliers of the records sought in *Lesar*—the Atlanta and Memphis police departments—were clearly established. In the present case, it has been suggested that the *Lesar* holding was in error because Exemption 7(D) cannot apply when the identity of the confidential source has already been disclosed and the sole purpose of withholding is to protect the information and not its source. But whatever the merit of this thesis, we do not consider it, for we are bound by our prior holding in *Lesar*. In the case before us, Interpol is in a position precisely analogous to that of the Atlanta and Memphis police departments in *Lesar*. Although it is known that Interpol was the source of the information in dispute—if indeed it is a confidential source, see note 47 *infra*—*Lesar* compels us to uphold USNCB's refusal to disclose the materials provided by Interpol.

In any event, we do not think this distinction is important here. USNCB has refused to release the records here sought because it fears divulgence of the identities of the foreign police authorities that submitted the materials to Interpol for transmittal to USNCB, as well as the sources utilized by those authorities and the substance of the information provided. See Drury Affidavit, *supra* note 3, at 9-14, J. App. 154-159. In this respect, Interpol was merely a conduit for those confidential sources. To command the release of information received from Interpol when that would not be required had USNCB received the data directly from the foreign law enforcement agencies would be nonsensical. Thus, contrary to the Church's assertions, this really is a case where the

In light of *Lesar* and *Baez*, the construction that the District Court placed on "confidential source" cannot be accepted.

B. *The Necessity of an "Actual, Contemplated Law Enforcement Proceeding"*

Additionally to concluding that the Government was unable to satisfy the confidential-source requirement of Exemption 7(D), the District Court ruled that the documents requested by the Church must be relinquished because the Government had not shown that the information withheld was obtained "in the course of an 'actual, contemplated enforcement proceeding.'" [28] The court found that the materials in question had been compiled for law enforcement purposes,[29] but it ruled that the absence of an ongoing law enforcement proceeding was fatal to the Government's dependence on Exemption 7(D) to protect

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effort is to shield both the identity of the confidential sources and the information they supplied.

[28] *Founding Church of Scientology* v. *Miller*, *supra* note 9, 490 F.Supp. at 149.

[29] *Id.* at 147. More precisely, the District Court stated that "[d]espite its lack of law enforcement authority, there can be no question that the records involved here were compiled by Interpol to relay to other police entities 'for law enforcement purposes.'" *Id.* Given the context of the District Court's statement, it appears that "Interpol" refers to USNCB as well as to the international organization headquartered in Paris. The nature of the "law enforcement purposes" requirement has been explored previously by this court, see, *e.g.*, *Abramson* v. *FBI*, —— U.S.App.D.C. ——, 658 F.2d 806 (1980), *cert. granted*, 49 U.S.Law Week 3924 (U.S. June 16, 1981); *Weissman* v. *CIA*, 184 U.S.App.D.C. 117, 119-121, 565 F.2d 692, 694-696 (1977); *Rural Housing Alliance* v. *United States Dep't of Agriculture*, 162 U.S.App.D.C. 122, 128-131, 498 F.2d 73, 79-82 (1974) (decided prior to enactment of 1974 FOIA amendments), as well as other circuits, see, *e.g.*, *Irons* v. *Bell*, 596 F.2d 468, 472-476 (1st Cir. 1979); *Kuehnert* v. *FBI*, 620 F.2d 662, 666-667 (8th Cir. 1980); *Founding Church of Scientology* v. *United States Dep't of Army*, 611 F.2d 738, 748-749 (9th Cir. 1979). Since no challenge has been raised to the holding that the documents were compiled for law enforcement purposes, we need not address that question in this case.

the data from disclosure.[30] We agree with the Government that this holding is in error. The pertinent language of Exemption 7(D) refers specifically to assemblies of information for "law enforcement purposes," [31] and we see no reason to read any further requirement into it.

In deeming an ongoing enforcement activity a precondition to operation of Exemption 7(D), the District Court relied to a large extent on *NLRB* v. *Robins Tire and Rubber Co.*,[32] where the Supreme Court held that to invoke Exemption 7(A) the Government must demonstrate that the information it seeks to withhold was compiled during the course of "actual, contemplated enforcement proceedings." [33] In marked contrast to Exemption 7(D), however, Exemption 7(A), safeguards materials compiled for law enforcement purposes "only to the extent that the production of such records would . . . *interfere with enforcement proceedings.*" [34] It is difficult to imagine how such interference could occur except during the course of "actual contemplated enforcement proceedings," and the risk of harm which Exemption 7(A) is designed to avoid thus exists only for the period when enforcement efforts are actively being pursued.

Conversely, Exemption 7(D) protects against the damage that might be done by disclosure of the identity of a confidential source or release of information supplied only by such a source. The danger inherent in divulgence of such data is not eliminated by the culmination of enforcement proceedings or by a decision that the informa-

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[30] *Founding Church of Scientology* v. *Miller*, *supra* note 9, 490 F.Supp. at 149.

[31] 5 U.S.C. § 552(b)(7)(D), quoted in text *supra* at note 20. See note 29 *supra*.

[32] 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

[33] *Id.* at 232, 98 S.Ct. at 2322, 57 L.Ed.2d at 172.

[34] 5 U.S.C. § 552(b)(7)(A) (1976).

tion on hand does not warrant initiation of such proceedings.[35] We therefore hold, that Exemption 7(D) does not require a showing that enforcement proceedings are currently under way, but only that the sought-after materials were amassed for law enforcement purposes.[36] We therefore reject the District Court's holding that the Government must demonstrate the existence of an actual contemplated enforcement proceeding to satisfy the demands of Exemption 7(D).

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[35] See *Bast* v. *United States Dep't of Justice*, No. 80-1050 (5th Cir. Sept. 10, 1981), at 6. See also *Rural Housing Alliance* v. *United States Dep't of Agriculture*, *supra* note 29, 162 U.S.App. D.C. at 129, 498 F.2d at 80. Although decided prior to the 1974 amendments of FOIA, the policy considerations expressed are still relevant.

[36] We note that the question whether an ongoing enforcement proceeding is required differs from the question whether the agency seeking refuge in Exemption 7(D) compiled the information for law enforcement purposes, see note 29 *supra*, and from the question whether the agency was conducting "a criminal investigation, or . . . a lawful national security intelligence investigation," a prerequisite to operation of Exemption 7(D). 5 U.S.C. § 552(b)(7)(D) (1976), quoted in text *supra* at note 20. In *Lesar* v. *Department of Justice*, *supra* note 22, we indicated that the agency may be required to demonstrate that withheld information was compiled in the course of a *legitimate* investigation of that type. See *Lesar* v. *Department of Justice*, *supra* note 22, 204 U.S.App.D.C. at 220, 636 F.2d at 492. Further guidance may be forthcoming from the Supreme Court since certiorari was recently granted in a case involving a distinct but related question. See *Abramson* v. *FBI*, *supra* note 29 (certiorari granted on question whether information compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) loses its exempt status when incorporated into records compiled for purposes other than law enforcement). We need not address that issue in this case, however, since the Church has not challenged the legitimacy of USNCB's purposes in requesting the information concerning the Church from Interpol.

III. Retrieval of the Documents From Interpol Headquarters

The Freedom of Information Act empowers federal courts to compel disclosure of agency records improperly withheld, but does not confer authority upon the courts to command agencies to acquire a possession or control of records they do not already have. This principle was firmly established by the Supreme Court's recent decision in *Kissinger* v. *Reporters Committee for Freedom of the Press*,[37] in which the Court held that an agency could not be required to undertake retrieval of documents removed—even though arguably improperly—from its custody. The materials in question were notes of Kissinger's telephone conversations during his tenure as Secretary of State and Assistant to the President for National Security Affairs. Kissinger had taken the documents with him when he left office, and the legality of their removal was open to question.[38] Despite the fact that the agency might have been able to regain possession of the documents by bringing suit against Kissinger pursuant to specific authorization granted by the Federal Records Act,[39] the Court held that it could not be required to do so.[40] The Court reasoned that "Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither the custody nor control necessary to enable it to withhold."[41]

In the case at bar, the District Court ruled that *Kissinger* was inapposite because, in its view, USNCB and

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[37] *Supra* note 17.

[38] 445 U.S. at 146-147, 100 S.Ct. at 966-967, 63 L.Ed.2d at 267.

[39] 44 U.S.C. § 3106 (1976).

[40] 445 U.S. at 150, 100 S.Ct. at 968-969, 63 L.Ed.2d at 281.

[41] *Id.* at 150-151, 100 S.Ct. at 969, 63 L.Ed.2d at 281.

Interpol are not entities independent of each other. The court took the position that USNCB was required to retrieve the sought-after documents from Interpol under the FOIA section providing for search and collection of "the requested records from field facilities and other establishments that are separate from the office processing the request." [42] We do not agree with that rationale. Although USNCB is an affiliate of Interpol, it serves only as the United States liaison with the organization; it is neither a branch nor an agent of Interpol. This characterization is in accord with *Sami* v. *United States*,[43] where we held that "USNCB act[s] exclusively as an agent of the national government which created, staffed, financed and equipped it," [44] and that therefore the presence of USNCB in the District of Columbia was not enough to establish a predicate for personal jurisdiction of the District Court over Interpol.[45]

The same reasoning applies full force in the instant case. If USNCB is not sufficiently related to Interpol to subject the latter to the jurisdiction of the District Court, surely Interpol is a third party in the eyes of *Kissinger*. In sum, we agree with the Government that "[t]he relationship of the USNCB to Interpol is . . . like that of the United States to the United Nations. Although a member of the organization, the USNCB is not Interpol." [46] Consequently, we disapprove the District Court's order re-

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[42] Decision on Reconsideration, *supra* note 14, 490 F.Supp. at 151, citing 5 U.S.C. § 552(a)(6)(B) (1976). In cases where records are located in field facilities the agency is permitted more time to produce the sought-after materials. 5 U.S.C. § 552(a)(6)(B) (1976).

[43] *Supra* note 4.

[44] *Id.* at 178, 617 F.2d at 760.

[45] *Id.* But *cf. Steinberg* v. *Interpol*, *supra* note 3.

[46] Brief for Appellants at 15. We decline to accept the Church's argument that the Government's retrieval of some Interpol documents precludes USNCB from refusing to attempt to obtain the rest.

quiring USNCB to retrieve and index the documents already forwarded to Interpol.

For the reasons set forth, the District Court's orders appealed from are reversed, and the case is remanded for further proceedings consistent with this opinion.[47]

So ordered.

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[47] As counsel for the Government acknowledged at oral argument, one question the District Court must determine on remand is whether or not Interpol actually did furnish the requested information to USNCB in confidence. The Government has suggested that the Interpol constitution and at least one United Nations General Assembly resolution may be relevant to this question, as would the affidavit of USNCB personnel asking for the information.

We also pause to point out that we intend no comment one way or the other on the sufficiency of the affidavits or *Vaughn* index provided to the District Court by the Government. The court indicated that the Government had been severely deficient in its responsibilities both with respect to the affidavits and the indices submitted. Our decision in this case is limited strictly to the three legal questions presented for review. Contrary to the Church's contentions, we find no basis for extending our review to an examination of the affidavits and indices before the District Court. Whether or not summary judgment on the Exemption 7(D) issue ultimately may be granted in favor of either party is for the District Court to decide in the first instance.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1471

THE FOUNDING CHURCH OF SCIENTOLOGY
WASHINGTON, D.C., INC.,
Plaintiff,

v.

W. MICHAEL BLUMENTHAL, ET AL.,
Defendants.

Filed Aug. 11, 1977

MEMORANDUM ORDER

The Founding Church of Scientology of Washington, D.C., brings this action against the Department of the Treasury, its Secretary and Deputy Assistant Secretary for Enforcement and Operations, and the United States National Central Bureau ("NCB") of the International Police Organization ("Interpol") and its Chief, seeking the disclosure of certain records under the Freedom of Information Act, 5 U.S.C. § 552. In pursuit of disclosure plaintiff filed a motion to compel detailed justification, itemization, and indexing of documents under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Plaintiff also sought to depose Mr. Jean Napote, Secretary General of Interpol, about the desired documents, and to this end moved for issuance of letters rogatory.

The two motions were briefed and argued before a United States Magistrate, who denied them on March 30, 1977. The matter is now before the court on plaintiff's objections to the Magistrate's determinations.

Upon consideration of the motions, the government's opposition to each of them, and the entire record in this case, I find ample support for the Magistrate's conclusion that the desired deposition is unlikely to produce neces-

sary, relevant information. Accordingly, I adopt his denial of the motion for issuance of letters rogatory. I also find ample support for the Magistrate's decision that those documents which were neither created by nor ever possessed by NCB are not "agency records" within the meaning of the Freedom of Information Act. The mere fact that NCB could under certain circumstances gain access to documents is an insufficient basis for ordering NCB to do so and to disclose them to plaintiff. See *Forsham* v. *Matthews*, Civil Action No. 75-1608 (D.D.C. February 5, 1976); *Ciba-Geighy Corp.* v. *Matthews*, 75 Civ. 5049 (S.D.N.Y. March 8, 1977). Interpol as plaintiff concedes is not an "agency" for present purposes. *See* 5 U.S.C. § 552(e). Accordingly I adopt the Magistrate's denial of plaintiff's motion for *Vaughn* indexing of documents created and possessed by Interpol.

With respect to a second category of documents, however, I find the Magistrate to be in error. Certain documents presently possessed by Interpol were originally created and maintained by NCB. These, then, clearly qualified at one time as "agency records" within the meaning of the Act. Without retaining copies of these documents, NCB forwarded them to Interpol, which maintains custody of them subject to demand by NCB for their production. I am satisfied that, despite the apparent lack of authority on this point, documents which qualify as "agency records" do not necessarily lose that status upon their transfer to a non-agency. On the contrary, where an agency retains access to such documents, they must remain "agency records." Any other result would be inconsistent with the general design of the Act, which "seeks to permit access to official *information* long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands," *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80 (1973) (emphasis added), and would invite abuse. Also, 5 U.S.C. § 552(a)(b)(B)(i) demonstrates that

Congress contemplated the possibility that compliance with the Act would require retrieval of records from various sources—e.g. "field establishments or other establishments that are separate from the office processing the request . . ."

For these reasons, it is this 10th day of August, 1977

ORDERED, that plaintiff's objection to the Magistrate's order of March 30, 1977, denying plaintiff's motion for letters rogatory be, and hereby is, overruled; and it is

FURTHER ORDERED, that plaintiff's objection to the Magistrate's order of March 30, 1977, denying plaintiff's motion to compel detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, be, and hereby is, overruled with respect to records maintained at Interpol that were never in the possession, custody or control of NCB; and it is

FURTHER ORDERED, that plaintiff's objection to the Magistrate's order of March 30, 1977, denying plaintiff's motion to compel a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, be, and hereby is, sustained with respect to records maintained at Interpol that were compiled, received, or maintained by NCB; and it is

FURTHER ORDERED, that defendants shall provide to plaintiff a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, of those records maintained at Interpol that were compiled, received, or maintained by NCB.

/s/ William B. Bryant
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1471

THE FOUNDING CHURCH OF SCIENTOLOGY
WASHINGTON, D.C., INC.,
Plaintiff,

v.

WILLIAM E. SIMON, ET AL.,
Defendants.

Filed Nov. 3, 1978

ORDER

Before the court now is a motion by defendants for clarification of this court's memorandum order of August 11, 1977, plaintiff's motion to compel defendants to comply with this order, and the parties' respective oppositions to these motions.

The Founding Church of Scientology of Washington, D.C., seeks the disclosure of certain records under the Freedom of Information Act, 5 U.S.C. § 552 from the Department of Treasury, its Secretary and Deputy Assistant Secretary for Enforcement and Operations, the United States National Central Bureau ("NCB") of the International Police Organization ("Interpol") and the Chief of NCB.

This court on August 11, 1977, ordered defendants to provide plaintiff with "a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen* of those records maintained at Interpol that were compiled, received or maintained by NCB". Memorandum Order at 4.

Defendants seek in their motion for clarification a guarantee from this court that if they acquire possession or control of the documents in their efforts to comply

with the order that their actions will not be interpreted to support the argument that these records are "agency records" within the meaning of the statute.

I have no authority to prejudge or determine the legal significance of any action the defendants take or may take in the future. It makes no difference that they act in a certain manner only in order to comply with an order of this court. The issue of whether the defendants' acquisition of control over certain documents makes them "agency documents' is not ripe for adjudication before this court.

The court's outstanding order of August 11, 1977, is therefore fully effective. This court will grant plaintiff's motion to compel, and will order defendants to provide a *Vaughn* index of the relevant documents within 20 days of the date of this order.

SO ORDERED.

/s/ William B. Bryant
United States District Judge

November 3, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1471

THE FOUNDING CHURCH OF SCIENTOLOGY
WASHINGTON, D.C., INC.,
Plaintiff,

v.

G. WILLIAM MILLER, ET AL.,
Defendants.

Filed Apr. 17, 1980

MEMORANDUM AND ORDER

The Founding Church of Scientology of Washington, D.C., brought this action against the Department of the Treasury, its Secretary and Deputy Assistant Secretary for Enforcement and Operations, and the United States National Central Bureau ["NCB"] of the International Police Organization ["Interpol"] and its chief, seeking the disclosure of certain records under the Freedom of Information Act [hereinafter "Act"], 5 U.S.C. § 552.

After long and often unnecessary detours,[1] the case has culminated in a dispute over the defendants' assertion of three exemptions to some or all of thirty-seven documents.[2] On January 28, 1980 the defendants at the court's request submitted the documents in dispute *in*

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[1] As an earlier court noted about a different government agency, the defendants have responded to plaintiff's requests for information with glacial celerity. For a discussion of these continental shifts, *see infra* at 8-9.

[2] The parties also disagree about the thoroughness of defendants' search of Interpol headquarters in France. This will also be dealt with below, *see* 8-9, *infra*.

camera to aid the court in resolving the remaining contentions of both parties.[3]

The court premises its resolution of this dispute on both the basic structure of the Act and recent opinions by the United States Supreme Court regarding the purposes of the Act. The Act is drafted in an unmistakable fashion. All records held by agencies of the United States Government are covered by the Act unless they are specifically exempted by the nine subsections of § 552(b). Further, the burden is on the agency asserting the exemption to prove its applicability. § 552(a)(4)(B)(b).

In a number of cases over the recent past the Supreme Court focused attention on the operation of this unusual Act. As Justice Thurgood Marshall noted in 1978, the Supreme Court has "repeatedly emphasized [that] 'the Act is broadly conceived,' *EPA* v. *Mink*, [410 U.S. 73, 80 (1973)] and [that] its 'basic policy' is in favor of disclosure, *Department of Air Force* v. *Rose*, [425 U.S. 352, 361 (1976)]." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978).

With this in mind the court will consider the three exemptions at issue. Defendants assert exemption § 552(b)(2) to withhold file and code numbers that appear on various documents. Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment at 10-13. Section (b)(2) exempts matters "related solely to the internal personnel rules and practices of an agency." The Supreme Court dealt with this exemption in a lengthy opinion in 1976. *Dept. of Air Force* v. *Rose*, *supra*. In *Rose* the Court held that while exemption (b)(2) is not applicable to "matters subject to . . . a genuine and significant public interest," the exemption does apply to "routine matters" of "merely

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[3] The *in camera* inspection is expressly authorized by the Act. 5 U.S.C. § 552(a)(4)(b) (1976). *See also Ray v. Turner*, 587 F.2d 1187, 1211 (D.C. Cir. 1978) (concurrence of J. Skelly Wright, C.J.).

internal significance" "in which the public could not reasonably be expected to have an interest." 425 U.S. at 369-70. The court is unable to ascertain any legitimate public interest in the file and code numbers at issue and will therefore sustain the defendants' assertion of exemption (b)(2) as to documents 2A, 3, 3A, 9, 10A, 13, 14, 15 and 19. *See, e.g., Nix* v. *United States*, 572 F.2d 998, 1005 (4th Cir. 1978); *Maroscia* v. *Levi*, 569 F.2d 1000, 1001-02 (7th Cir. 1977).

Next, the defendants assert exemption (b)(7)(c) to protect the names and the personal identifiers of persons referred to in certain documents. Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment at 13-15. Section (b)(7)(c) protects from disclosure portions of "investigatory records compiled for law enforcement purposes" that would "constitute an unwarranted invasion of personal privacy."

In the present case the names and personal identifiers are, with a single exception,[4] of government officials. To apply §(b)(7)(C) the court must assess the interest in privacy and weigh it against any public interest in disclosure. *Department of the Air Force* v. *Rose*, 425 U.S. at 372-73; *see also Retail Credit Co.* v. *FTC*, 1976-1 Trade Cases 68,124, 68,128 (D.D.C. 1976) (Jones, C.J.), *citing Getman* v. *NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971) (J. Skelly Wright, J.) Once again the court is unable to ascertain any public interest in the revelation of these names in this case. As the court in *Nix* v. *United States* noted, in a matter arousing greater public interest, nondisclosure of these officials' identity might be overborne by the legitimate interest of the public. 572 F.2d 998, 1006 (4th Cir. 1978), *citing Deering* v. *Milliken*, 548 F.2d 1131, 1136-37 (4th Cir. 1977). *But see, Ferguson* v. *Kelly*, 448 F. Supp. 919, 924 (N.D. Ill.

[4] Document 19 contains the name of a third party under investigation by a police agency.

1978). This ruling applies to both the names of public officials and the third party mentioned in one of the police documents. *Nix* v. *United States*, 572 F.2d at 1006; *Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977); *Lamont* v. *Department of Justice*, 475 F. Supp. 761, 777 (S.D.N.Y. 1979) (Weinfeld, J.).

The last exemption involved, (b) (7) (D), has been asserted by defendants for all thirty-seven documents in question. Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment at 15-19. Section (b) (7) (D) protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records . . . disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source." The court will analyze the application of § (b) (7) (D) to this case in two parts, looking first at the question of disclosing the "identity of a confidential source" and, second, at the question of disclosing "confidential information furnished only by the confidential source."

In order to qualify under § (b) (7) (D) to withhold the identity of a confidential source the defendants must show that the documents involved are "investigatory records compiled for law enforcement purposes." The records are in the possession of Interpol, which "serves mainly as a clearinghouse and relay center for information on crime and criminals for police forces in 130 member countries," Affidavit of James B. Clawson at 4, and has no law enforcement powers. Despite its lack of law enforcement authority, there can be no question that the records involved here were compiled by Interpol to relay to other police entities "for law enforcement purposes."

But to successfully assert § (b) (7) (D) defendants must also show that the documents do, in fact, contain

"confidential sources." The defendants argue that the various police agencies who requested and received information from Interpol and relayed information to Interpol constitute "confidential sources." Putting aside the rather obvious question of how an agency letter soliciting information can constitute a confidential source, this raises the issue of whether police agencies can be confidential sources for the purposes of § (b) (7) (D).

It is not clear from the face of the statute whether "confidential source" includes foreign, state and local law enforcement agencies. The Supreme Court has directed that the courts turn to legislative history when confronted with such ambiguity. *Train* v. *Colorado Pub. Interests Research Group*, 426 U.S. 1, 9-10 (1976). Whatever ambiguity lies in the statute must be forever dispelled by the rather lengthy legislative history on this point. This court could not improve on the careful workmanship of Circuit Judge Wallace in a recent dissent and will therefore quote it at length:

> As originally proposed by Senator Hart, subsection (b) (7) (D) exempted "[i]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of an informer. . . ." *See* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 332 (Joint Comm. Print 1975) [hereinafter cited as Source Book]. At the time of his introduction of the amendment, Senator Hart stated:
>
> > Fourth, the amendment protects without exception and without limitation the identity of informers. It protects both the identity of informers and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citi-

> zens who give information to enforcement agencies and desire their identity to be kept confidential.

Source Book, *supra*, at 333-34. *See also id.* at 351 (Memorandum letter from Senator Hart).

In response to President Ford's concerns, the Conference Committee substituted "confidential source" for "informer." *Id.* at 367, 378, 450-51, 459 (remarks of Senators Kennedy and Hart and Congressman Moorhead). Its joint explanatory report, which "represents the considered and collective understanding of those [legislators] involved in drafting and studying proposed legislation," *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969), said:

> The Substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a *person* other than a paid informer may be protected if the *person* provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source *who* furnished the information.

H.R. Rep. No. 93-1380 & S. Rep. No. 93-1200, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6285, 6291, *and in* Source Book at 230 (Emphasis added).

My brethren disregard the clear language of this explanatory report by contending that the Conference Committee used "person" as a collective noun and that the expansive nature of their message precludes any restrictive reading of "confidential

source." Not only is it unlikely that the Committee was using the law dictionary definition of person, as my brethren contend, but even if they were, that definition of the term would not include foreign, state, and local law enforcement agencies. *See, e.g.*, 1 U.S.C. § 1. The Committee's use of "person" in explaining the change from "informer" plainly reveals that their intent to protect only human sources had not changed. Moreover, the majority's reliance on the expansive intent of the Committee report is misplaced. General intent should not be used to controvert specific language; indeed, the Committee itself chose to express its intent by the term "person." [*Church of Scientology of California* v. *United States Dept. of Justice*, No. 76-2506, slip op. at 3-5 (9th Cir. November 8, 1979) (dissent) (footnote omitted).]

The court has chosen to rely on the dissent rather than the majority in the *Church of Scientology of California* case.[5] Some courts, expressing concern over the public interest in cooperation between police authorities, have balanced competing interests in law enforcement and public disclosure to determine whether disclosure should be ordered.[6] But unlike § (b) (7) (C), where a court must determine whether disclosure would invade privacy to such an extent that an exemption should be

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[5] The court's (and Judge Wallace's) reading of the legislative history is shared by District Judge Grady, *Ferguson v. Kelley*, 448 F. Supp. 919, 925 (N.D. Ill. 1978). *But see Nix v. United States*, 572 F.2d 998, 1005 (4th Cir. 1978); *Lesar v. United States*, 455 F. Supp. 921, 924 (D.D.C. 1978) (Gesell, D.J.).

[6] *Lesar v. United States*, 455 F. Supp. at 924; *cf. Church of Scientology of California v. United States Dept. of Justice*, slip op. at 14-15 (recognizing public interest in cooperation between police agencies); *Nix v. United States*, 572 F.2d at 1005 (same). Although the concern for police cooperation is undoubtedly a very legitimate one, it is perhaps a concern that the judiciary should best convey in a private capacity.

allowed,[7] § (b) (7) (D) does not allow for court balancing of competing interests. Under § (b) (7) (D) the court must determine whether material contains "confidential sources." To understand what Congress meant by "confidential sources" the court has resorted to the time-honored and court-tested procedure of examining the legislative history. Once the legislative history produces an answer, a definition of "confidential sources," the court has only one further task: to apply that definition. Once the Congressional intent is determined, the court may not balance interests to decide whether to act on that Congressional intent.

The court holds that the term "confidential source" applies to *persons* providing information under assurances of confidentiality and not to law enforcement agencies.

The court turns now to the question of whether production of these thirty-seven documents would reveal "confidential information furnished only by the confidential sources." The defendants have made no attempt to present factual data substantiating the assertion that anything in these thirty-seven documents stems from individuals who are confidential sources as is required by § (b) (7) (D). Even more telling, most of the information in the documents at issue concerns events long past, some more than thirty years past. The Supreme Court held in *NLRB* v. *Robbins Tire & Rubber Co.* that the legislative history to § (b) (7) "suggests that the release of information in investigatory files *prior to the completion of an actual, contemplated enforcement proceeding* was precisely the kind of interference that Congress continued to want to protect against." 437 U.S. 214, 232 (1978) (emphasis added) *quoted in Ray* v. *Turner*, 587 F.2d 1187), 1222 n. 91 (D.C. Cir. 1978) (concurrence of J. Skelly Wright, C.J.). Defendants have the burden of proving that the information at issue was compiled in

[7] *See* 3-4, *supra*.

the course of an "actual, contemplated enforcement proceeding." The defendants have not made any attempt to demonstrate this and there is nothing in the documents to lead the court to believe that such a demonstration is possible. Defendants' assertion of § (b) (7) (D) is therefore denied in its entirety.[8]

Apart from the dispute over the exemptions, the parties are also in disagreement concerning the court's August 11, 1977 order for a search of Interpol headquarters in Paris, France. This court order required the defendants to provide a *Vaughn* index of all "records maintained at Interpol that were compiled, received, or maintained by NCB." The words "compiled, received and maintained" were used twice in the August 11, 1977 order. Memorandum Order at 3, 4. But lest there be any doubt, the defendants filed for and the court entertained a Motion for Clarification of this order. In the court's November 3, 1978 order denying defendant's Motion for Clarification the court once again repeated the terms "compiled, received or maintained." Despite all of the above, defendants requested Interpol to forward only those documents "created by and maintained by the Washington National Central Bureau of Interpol." Memorandum in Response to Plaintiff's Motion Under *Vaughn* v. *Rosen* for New Index and for a Further Search for Documents at 2. In addition, the defendants did not include in their request to Interpol's French headquarters docu-

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[8] Although defendants have not asserted a § (b) (7) (C) privacy exemption for the majority of these documents, the names, addresses and occasionally phone numbers of law enforcement personnel do appear in some of the documents. In accordance with the court's ruling above, *see* 3-4, *infra*, the court will allow a § (b) (7) (C) exemption for any names, addresses and phone numbers of law enforcement officers appearing in these documents.

By the same token, although the defendants have not asserted § (b) (2) for the majority of documents withheld on the basis of § (b) (7) (D) the court will allow a § (b) (2) exemption for any file and code numbers appearing in these documents.

ments relating to two of the search terms in plaintiff's initial request under the Act, "Scientology" and the "Church of Scientology." This too violates the court's orders of August 11, 1977 and November 3, 1978. Today the court orders the defendants yet again to comply with its original August 11, 1977 order.

The above is but one example of the government's general practice in this case of engaging in dilatory tactics.[9] It ill-behooves the United States Government to participate with such cunning creativity in what can only be seen as an attempt to frustrate the will of Congress in enacting the Freedom of Information Act and this court in enforcing it. Accordingly, it is by the court this 17th day of April 1980,

ORDERED, that defendants' Motion for Summary Judgment is granted as to all file and code numbers withheld under § 552(b)(2);[10] and

FURTHER ORDERED, that defendants' Motion for Summary Judgment is granted as to all names, addresses

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[9] Twenty-nine months after this court dismissed the government's first attempt at a *Vaughn* index as "conclusory," "accompanied by no factual support" and "utterly unsatisfactory in every respect," April 8, 1976 Memorandum and Order at 2, the government produced a *Vaughn* index that suffered from most of the same ills. September 10, 1979 Affidavit of Marydale Drury. Despite the fact that the court told defendants in its April 8, 1976 Memorandum and Order that it would permit them "one last opportunity to represent the public interest" and present the detailed justifications required in a *Vaughn* index, the court has nevertheless accepted and considered the government's third attempt. *See* Supplemental Affidavit of Marydale Drury (November 2, 1979). Although an improvement, this document still lacks the factual support necessary to a *Vaughn* index and is also in flagrant disregard of the United States Court of Appeals for the District of Columbia's recent dictate that if the government is to issue successive indices covering the same material they must be cumulative. *Founding Church of Scientology of Washington, D.C. v. Bell*, 603 F.2d 945, 949 (1979) (per curiam).

[10] *See* n.8, *supra*.

and phone numbers of government officials withheld under § 552(b)(7)(C);[11] and

FURTHER ORDERED, that plaintiff's Motion for Summary Judgment is granted as to all documents withheld under § 552(b)(7)(D);[12] and

FURTHER ORDERED, that defendants shall provide plaintiff on or before May 7, 1980 with a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), of those records maintained at Interpol, Paris, France that are responsive to plaintiff's Freedom of Information Act request and that were *compiled, received, or maintained* by NCB.

/s/ William B. Bryant
United States District Judge

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[11] *Id.*

[12] *Id.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1471

THE FOUNDING CHURCH OF SCIENTOLOGY
WASHINGTON, D.C., INC.,
Plaintiff,

v.

G. WILLIAM MILLER, ET AL.,
Defendants.

Filed May 13, 1980

MEMORANDUM AND ORDER

On April 17, 1980 this court granted summary judgment for the plaintiffs as to certain documents withheld by the United States National Central Bureau ["NCB"] of the International Police Organization. The defendants responded with a motion for reconsideration and a motion for summary judgment as to newly identified, withheld documents in their possession. This memorandum and order deals only with the defendants' motion for reconsideration.

The bulk of defendants' motion for reconsideration is nothing but a reargument of their original briefs and sheds no additional light on the controversy.[1]

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[1] The defendants' note an "ambiguity" in the court's memorandum and order. Defendants' Motion for Reconsideration and for Summary Judgment at 5. On page four of the court's April 17, 1980 opinion this court stated that the records in dispute were compiled by NCB " 'for law enforcement purposes.' " On page eight of the same opinion this court held that defendants had not met the burden of "proving that the information at issue was compiled in the course of an 'actual, contemplated enforcement proceeding,' " *quoting NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978). There is, of course, no contradiction in these two holdings. To be exempt under 5 U.S.C. § 552(b)(7)(D) documents must be

The defendants' lengthy motion for reconsideration does raise one point worthy of response. On March 3, 1980 the United States Supreme Court handed down *Kissinger* v. *Reporters Committee for Freedom of the Press*, 100 S.Ct. 960. In the *Kissinger* opinion the Court found that an agency is not withholding documents under the Freedom of Information Act unless those documents are in the agency's possession or control. *Id.* at 968-71. Defendants in the present case argue that the documents in Interpol's France office are not in their "possession or control." Such a position can not be supported by the *Kissinger* opinion. First, in *Kissinger* the Court repeatedly referred to the lack of any Congressional intent to impose on an agency the burden of suing to retrieve records from a third party. There is no indication here that NCB would have to sue its Interpol, France headquarters to retrieve the documents. Indeed, NCB has already retrieved documents from Interpol, France in partial compliance with the court's earlier orders. Second, in discussing Congressional intent the *Kissinger* Court adverted to § 552(a)(6)(A) & (B). Under this provision of the Act agencies may delay responding to requests under "unusual circumstances." The Act defines "unusual circumstances" as "the need to search for and collect the requested records from field facilities and other establishments that are separate from the office processing the request." While the provision makes no reference to filing suit to retrieve documents, it does specify the need to "search for and collect the requested records from field facilities and other establishments." This suggests that Congress expected agencies to search

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both "investigatory records compiled for law enforcement purposes" and "a record compiled by a criminal law enforcement authority in the course of a criminal investigation." This court ruled in its April 17, 1980 memorandum and order that the defendants had met the former threshold, but since the records were not compiled in the course of an "actual, contemplated enforcement proceeding," the defendants had not met the latter threshold for exemption under § (b)(7)(D).

for their documents in affiliate offices. Finally, to rule otherwise in a case such as this could result in virtually exempting the NCB from the operation of the Act. NCB would simply have to transfer its records to its parent organization in France to avoid compliance entirely. Congress could not have intended such blatant evasion. Accordingly, it is by the court this 13th day of May 1980,

ORDERED, that defendants provide plaintiff immediately with a detailed justification, itemization, and indexing under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), of all those records maintained at Interpol, Paris, France that are responsive to plaintiff's Freedom of Information Act request and that were *compiled, received or maintained* by NCB; and

FURTHER ORDERED, that defendants provide plaintiff immediately with all documents withheld under § 552 (b) (7) (D), except those documents withheld on privilege claims filed after this court's April 17, 1980 memorandum and order.

/s/ William B. Bryant
United States District Judge

May 13, 1980